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[ORIGINAL CIVIL JURISDICTION]

HORNE, J.

December 31, 1938.

PANA VANA LETCHUMANAN CHETTIAR v. THE JUPITER GENERAL INSURANCE CO. LTD.

[SINGAPORE SUIT No. 90 of 1937]

Insurance (Marine)—Damage to cinematograph films—Goods carried on deck—Alleged misrepresentation and non-disclosure—"Perils of the seas and all other perils"—Degree of proof required from a plaintiff—Insurable interest—Measure of indemnity—Marine Insurance Act, 1906, sections 71 (2) & 16 (3).

Action for loss upon an open policy of marine insurance effected in Madras upon 3 boxes of cinematograph films and 1 case of advertisement matter for shipment to Singapore.

The facts of the case are sufficiently set out in the Judgment reported below.

Koek for Plaintiff: on the issue of non-disclosure that the goods were carried on deck, cited *Blackett* v. *Royal Exchange Assurance Co.* (1832) 2 Cr. & J. 250; *Da Costa* v. *Edmunds* (1815) 4 Camp. 142; on the issue as to whether the goods were damaged by perils of the sea, cited *Hamilton Fraser & Co.* v. *Pandorf & Co.* 12 A.C. 518: *Blackburn* v. *Liverpool Brazil & River Plate Steam Navigation Co.* (1902) 1 K.B. 290; *The Stranna* (1937) 2 A.E.R. 383, affirmed (1938) 1 A.E.R. 458; on the issue as to degree of proof required, cited *Gaunt* v. *British & Foreign Insurance Co.* (1920) 1 K.B. 903, affirmed (1921) 2 A.C.41; as to insurable interest and measure of indemnity cited *Ebsworth* v. *Alliance Marine Insurance Co.* 8 C.P. 596; *Waters* v. *Monarch Life Assurance Co.*, 5 El. & Bl. 870; *and Samuel* v. *Dumas* (1923) 1 K.B. 592.

Spenser Wilkinson, for Defendants: on the issue of non-disclosure cited *Hood* v. *West End Motor Car Packing Co.*, (1917) 2 K.B. 38; as to whether goods were damaged by perils of the sea, cited *Sassoon & Co.* v. *Western Assurance Co.*, (1912) A.C. 561; as to insurable interest and measure of indemnity, cited *Boston Fruit Co.* v. *British & Foreign Marine Insurance Co.* (1906) A.C. 336 & *Castellian* v. *Preston*: 11 Q.B.D. 380

Koek in reply.

HORNE, J.—The plaintiff is the attorney and agent of Arunachalam Chettiar and Venkatachalam Chettiar. His principals entered into a contract in writing with Vel Pictures Ltd. of Madras, whereby in consideration of the payment to them of Rs. 13,500, the company under clause 1 of the contract leased and hired to the Chettiars "the exclusive and sole right to exhibit and distribute for exhibition in the F.M.S. and S.S. including Alor Star, Kedah, Perak, Johore and Java only for a period of three years and for no other purpose whatsoever." Under clause 2 the Company agreed to deliver one black and white print of each of the said films, Markandeya, Krishna Leela, and Pattinathar and certain publicity matter. Under clause 3 the Company agreed to supply such number of further positive prints as and when the lessors require during the continuance of the agreement at cost price within 4 weeks of indent and provided the negative is in existence and in a proper condition to take such prints. Under clause 13, all positive prints delivered hereunder to the lessees shall be returned to the Company in order to ensure non-exploitation thereof after the expiration of the period of this agreement.

One positive print of each of the films was duly delivered and screened in a Madras cinema theatre on or about the 5th December 1936 and accepted by the principals. They were then packed, each reel in a separate tin container and the containers packed in three steel boxes which were locked by the plaintiff, who kept the keys. Sugesan & Co. of which Sunarasa Iyer is the Managing director, then took them from the theatre to a godown, upon the verbal instructions of the plaintiff. These instructions were to ship them to Singapore and to insure them with all risks covered. The plaintiff then left for Colombo and proceeded to Singapore by another steamer.

On the 8th December Sugesan & Co. applied to the Mercantile Marine Department for permission to ship the films, and a permit was accordingly issued and sent to the ship's agents Binny & Co. On the 11th December Sugesan & Co. registered the films with the Madras Customs for subsequent re-entry as being of Indian manufacture and gave the value as Rs. 19,650. On the 14th December they obtained the Bill of Lading and delivered the goods to s.s. Rohna. On the 15th they obtained the policy from the defendants and forwarded these documents to the plaintiff at Singapore. The s.s. Rohna arrived on the 26th December and the three steel boxes were delivered to the Singapore Harbour Board. On the 28th December the plaintiff's servant or agent took delivery of the boxes from the Singapore Harbour Board godown in apparent good order and condition, and conveyed them to the Censor's Office. On the 29th when the boxes were opened, the contents of two of them containing the Pattinathar film, and the Krishna Leela film were found to be damaged by water so as to be useless. The other box containing Markandeya

was undamaged. The insurer's agents Slot & Co. were duly informed and they made a Survey Report on the 29th on the following terms:—

"Survey Report."

"At the request of Lakshamanan Chettiar Esq., of 38 Marker Street, Singapore, we inspected at the Film Censor's Office at Maxwell Road, Singapore, on the 29th inst., the following:—

L C.

Singapore—3 Locked Iron Boxes containing Cinematograph Films.

All 3 boxes were stained. On opening up we found the entire contents of 2 boxes containing in all 43 reels of Cinematograph Films consisting of the Krishna Leela and Pattinathar Films to be entirely damaged by water. Moisture had penetrated into each separate tin container and the Films are in our opinion worthless and only fit for destruction. The contents of the remaining case containing the Markandeya Film were found to be undamaged.

This certificate is issued subject to the terms and conditions of the policy and reserving to the underwriters all rights and exceptions of same.

G. H. Slot & Co. Ltd.
Sgd. Illegible.
Director.

As Agents Jupiter General Insurance Co. Ltd., Singapore, 29th December, 1936. Insurance Policy No. MMC 101418. Survey Fee $10.00."

Slot & Co. also enquired of the steamer's agents who affirmed that the boxes had been carried on the boat deck and were properly protected by dunnage wood and tarpaulin, and were delivered in apparent outward good order and condition. On the 29th December the plaintiff made his claim to Slot & Co. who on the 5th February after communicating with their defendant Co. repudiated liability "on the ground that the business was accepted on the distinct understanding that the goods in question were to be placed in the Captain's room, whereas we are informed by the ship's agents that the cases were stowed on the boat deck."

The plaintiff then issued his writ in this Court and claims $8,601.93 as the loss recoverable under the policy.

Several defences have been pleaded but in the result the defendants now say that the plaintiff can recover nothing on three alternative grounds viz:—

1. That the plaintiff at the time of the insurance misrepresented a fact to the defendants then material to be known to them by orally representing that the goods were to be carried in the Captain's cabin during the voyage whereas in fact the goods were carried on deck.
2. That the goods were never covered by the policy or were never at risk because the plaintiff did not disclose that the goods were to be and were carried on deck.
3. That the plaintiff has not proved that the damage was the result of a peril of the sea.

Further even if they are unsuccessful on either of these three issues then the plaintiff is only entitled to recover the replacement cost of the damaged articles and not the value he has put upon them.

It must, however, be noted that in the pleadings the defendants denied that the plaintiff was interested in the subject matter of the insurance but at the trial they admit an insurable interest but submit that the loss is limited to replacement.

The onus of proof as to the misrepresentation and the non-disclosure is upon the defendants. Taking these in their order: As to misrepresentation, there is a conflict of evidence. The negotiations for the issue of the policy were conducted by telephone between Sundaresa Iyer acting for the plaintiff and Venkatarama Iyer acting for the Insurers. There are no written instructions from the plaintiff to Sundarasa Iyer and apart from the policy there is nothing in writing except a note in pencil Exhibit III stated to be made by Venkatarama Iyer's clerk—It reads "3 Boxes Films—Singapore—Rohna—20,000/ —Lakshanan Chettiar—L.C. Singapore —1 case advertisement material"—At one side in ink is the number of the policy 101418.

The oral evidence of Mr. Sundarasa Iyer the shipper and Mr. Venkatarama Iyer the Insurer was taken on commission in Madras. I have their respective depositions before me, and have carefully studied them both. There is certainly a very awkward conflict of evidence. The insurer states that at first he refused to accept cinema films as they are not safe risks, but accepted them because he was told that the cases were well packed and they would be shipped in the Captain's cabin. He then issued a policy at W.P.A. rates i.e. five annas per cent in accordance with the rules of the local Insurance Association. He declares the shipper said nothing about the goods being carried on deck and that there is no usage that films should be so carried and had the fact been mentioned he would have charged double the F.P.A. rate, at least six annas. In cross-examination he admits that he knows films

may be carried on deck. Incidentally his first statement that he refused to accept the risk shows he had knowledge. He also stated that he charged W.P.A. rates on the representation that the goods would be carried in the hold; and finally states that Exhibit III the pencil note contains all the instructions he received.

Now the shipper on the other hand denies making any statement re carriage in the Captain's cabin. Being in possession at that time of a local Marine Department permit to ship dangerous goods and of a Bill of Lading endorsed "cargo carried on deck at shipper's sole risk" it does not appear to me probable that he would represent that the goods were to be carried in the Captain's cabin.

Accordingly I find that that representation was not in fact made.

The shipper admits that he did ask for the goods to be insured on W.P.A. terms. I think that must be accepted as a fact, both shipper and insurer agree there and the policy is W.P.A. The shipper, however, maintains both in chief and in cross-examination that he did inform the insurer over the telephone that the goods were to be carried on deck. Certainly he knew they were to be, at the time, and there was no reason why he should not disclose the fact; especially when the insurer says there was a discussion and he (the insurer) had expressed doubt as to accepting the risk. On a comparison of the two depositions, I find myself more inclined to believe the shipper's than the insurer's account of the transaction. The shipper appears to me to be a more consistent witness, and I accept his account and find that he did in fact disclose to the insurer that the films would be carried on deck.

Even if the matter were left in doubt, there is the admission of the insurer that he knew the films may be carried on deck. There was at least sufficient knowledge in the insurer so that the risk attached. There is also the evidence of the master and the shipping clerk, that this line of vessels only carry inflammable or dangerous goods as deck cargo. Further the goods are declared as "films." There was ample information to put the insurer on enquiry.

The next point is whether the plaintiff has proved that the damage was caused by a peril of the sea.

I accept as a fact that the goods were in good condition when shipped, and that they were carried on deck in the manner described by the master of the vessel, and that sea water is found in the two boxes when they are opened at the Film Censor's office. I note that the survey report does not specifically say sea water, but the insurer's agents immediately wrote to the ship's agents saying the goods are "very badly damaged by water (presumably by sea water) outwardly." The plaintiff says he took some on his tongue and it was salt. Further the deck where the goods were stowed is about 50 feet above the water-line. The master says it was the usual practice daily to wash down this deck using a hose with a certain force of water and also to holystone and scrub the deck from time to time. On being opened the boxes were found to contain water to the depth of one inch after the containers had been removed. At that time Mr. Ziedl of Slot & Co. stated that it might have happened during the washing down. It does not appear to me in any way improbable that the seaman with the hose washing down, seeing boxes of this type, which appear watertight, and were placed upon dunnage wood, would not play the hose over them and that the water would enter the boxes, and all the more so when two out of the three are damaged. There is no evidence suggesting any other cause of the damage. I have seen the two steel trunks and the damaged films in their tin containers, and they appear sufficiently protective against the entry of water though it is doubtful whether either would stand prolonged immersion. There is no direct evidence as to when and how the sea water got into the steel trunks, and the insurers give no evidence on the matter.

The plaintiff's case as to this question is (i) that he is not bound to show how the actual damage (assuming it is damage by sea water) has been caused, (ii) that in any event it is justifiable to draw the inference that it has been caused during the washing of the deck.

For the first proposition *Gaunt* v. *British & Foreign Insurance Co.* (1920) 1 K.B. 903, is relied upon. In that case the cover was all risks during a particular but heterogeneous transit of the wool from sheeps' back to the ocean going ship, which included land transport warehousing and conveyance by local vessels. I do not think that it is sufficient under "peril of the sea" if the plaintiff only "proves a loss which may probably be caused by some fortuitous accident or casualty and may not be equally probably caused by any happening not a fortuitous accident or casualty, or otherwise not covered by the policy." (Atkin L.J. at p.913).

But I do think I am justified in drawing the inference that in fact this damage has been caused by the act or acts of some member or members of the crew during the course of washing down the deck. There is here something which may happen and not something which must happen and it happens during the voyage of the ship. It falls within the definition of perils of the sea given by Lord Bramwell in *Thames and Mersey Marine Insurance Co.*

Hamilton, Fraser & Co., 12 App: Cases 484 at 492 viz: "Every accidental circumstance not the result of ordinary wear and tear, delay, or the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation." Washing decks is incidental to the navigation, for ships must be kept clean and the decks need to be wetted down. It is a wooden deck, and as the master has described, must periodically be scrubbed and holystoned. It is not to be anticipated that in the course of these operations even with the ordinary use of a hose pipe, that sea water will get into these trunks which are stowed upon dunnage and covered by tarpaulin.

There appears to be just as much a peril of the sea here as in *Hamilton, Fraser & Co.* v. *Pandorf & Co.* where the sea water got into the cargo through the rats gnawing through a lead pipe in the hold, and as in *Blackburn* v. *Liverpool Brazil & River Plate Steam Navigation Co.* (1902) 1 K.B. 290) where the engineer inadvertently opened the wrong valve and introduced the water into the tank where the cargo had been stowed and so damaged it.

I therefore find that the damage has been caused by a peril of the sea.

The matter of indemnity is not without difficulty. By section 71 (2) of the Act "Where part of the goods insured by an unvalued policy is totally lost the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss." By section 16 (3), the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole.

The plaintiff produces Exhibit "D." To hire of Pattinathar Talkie as per agreement 5th November 1936 Rs. 6,000/- and "D 1" a similar invoice for Krishna Leela Rs. 3,000/-. These he submits is the prime cost. It is admitted he paid these sums. *Prima facie* Rs. 9,000/- is the prime cost of a rather mixed form of property consisting of a positive print of a "talkie" and the right to exhibit the same for three years, which period is about to commence. This is a property which can hardly be measured by the replacement cost of the positive print. It is a wasting property; and apart from the reversionary interest of Vel Pictures, which I think, in the absence of evidence, can be no more than nominal, is practically valueless at the end of the three years. The print apart from the rights cannot be separately valued though it separately exists.

Nevertheless in dealing with insurance of property of this character, the rules for ascertaining insurable value contained in the Act, must nevertheless be considered in the light of the principle that an insurance is a contract of indemnity and in consequence all the insurer ought to be called upon to pay is an amount which will put the assured in the same position as if he had not undertaken the adventure. The adventure, that is the voyage, was completed; the goods arrived but were unfit for the intended purpose. I think, therefore, that although Rs. 9,000/- is *prima facie* the prime cost, more than one month of the time-element in the value had gone before shipment, and must be allowed in the insurer's favour. Five months went before replacement and an allowance 5/36 of 9,000 has to be made to the insured that is a sum of Rs. 750 less Rs. 250/- the month gone before shipment that makes Rs. 500/- added to this the replacement cost Rs. 3,220/- the insurance Rs. 57-2-0 and the freight Rs. 15-6-0, there is a total sum of Rs. 3,792-8-0* or its equivalent in Straits Settlements currency which, in my opinion, is a full indemnification for the loss. I give nothing for the alleged duty to return the original positive print to Vel Pictures Ltd., a print three years old would be of merely nominal value and there is no evidence as to that value. I am not convinced that an enquiry as to these figures would lead to anything more satisfactory.

With regard to over insurance, this matter hardly arises, as fraud is not alleged and although I think the figure of Rs. 20,000/- is high, it is I think based on a mistake as to the effect of the agreement with Vel Pictures Ltd. It is very difficult under this agreement with its clause 10 for example to say with accuracy what is the insurable value for there is always the possibility of part of the price, which I call *prima facie* prime cost being returned upon an event which can only be ascertained after the policy has expired. How that risk can be estimated for at the time of shipment is naturally difficult but some allowance would have to be made, in such uncertainty it would be difficult to apply section 16 (2) literally, to an unvalued policy in the absence of a fuller description of the subject matter insured than there was in this case.

Judgment accordingly.

January 24, 1939.

Koek for the Plaintiff applied for (a) interest on the amount recovered, citing the Civil Procedure Act, 1833 (3 & 4 Wm. IV c.42) s. 29 and Order 34, Rule 41; (b) costs on the higher scale.

Smith, for the Defendant *contra*.

Horne J., made the following Order.

*These figures were subsequently amended on reference to the Judge who settled the amount recoverable at Rs. 4,798-10-3, with interest at 5% for 1 year and 336 days in an Addendum to the Judgment.

The plaintiff to have 5% interest from 29th January 1937 on amount recovered. The parties to be at liberty to adjust the figures re freight and the five months time-element figure if necessary. Rupees to be converted to Straits Settlements currency at rate given in Statement of Claim.

The plaintiff to have costs of suit on lower scale.

Judgment accordingly.

Solicitors for the Plaintiff—

Chan & Eber.

Solicitors for the Defendants—

Donaldson & Burkinshaw.

[APPELLATE CIVIL JURISDICTION]

McELWAINE, C.J.

January 15, 1939.

BAHADAR SINGH.....Plaintiff (Appellant)

vs.

ALBERT TAN ALIAS TAN LENG YAM.... Defendant (Respondent)

[MALACCA CIVIL DISTRICT COURT APPEAL No. 3 of 1938]

Credibility of witnesses—importation of considerations from outside the case.

It is no sufficient reason for disbelieving a money-lender for a District Judge to say that he has had experience of other money-lenders who have not been truthful witnesses. A Judge is not entitled to assume that a man is a liar just because he is a money-lender.

DISTRICT COURT APPEAL.

S. C. Goho for the appellant.

Paulusz for respondent.

Cur. Ad. Vult.

McELWAINE, C.J.—The appellant who is a money lender sued the defendant for $270/- being $250/- alleged to be due as principal and $20/- as arrears of interest on a promissory note.

The defence was that the principal was not truly stated in the note as required by the Money Lenders Ordinance (Chapter 218) section 4 and the learned District Judge accepting the defendant's evidence that only $100/- was advanced dismissed the claim with costs.

The appellant appeals on two grounds, first that the learned District Judge in finding that only $100/- had been advanced improperly took into consideration matters extraneous to the case: second that on his finding the District Judge should have given judgment for the $100/- which he found had been advanced.

The appeal was argued on the first ground only, the second ground being reserved for a full Court in the event of the appeal on the first ground failing.

As the making of the note for $250/- with interest at the rate of 24% per annum was admitted the onus was on the defendant to satisfy the Court that he did not receive the principal sum named in the note the receipt of which was expressly acknowledged in a memorandum signed by the defendant in which he also acknowledged the receipt of a copy of the promissory note.

The defendant and Toh Seng Huat gave evidence for the defence and the plaintiff gave evidence on his own behalf. The District Judge accepted the evidence of the defendant and his witness, but he does not appear to have been greatly impressed by the defendant of whom he said "The defendant is a spendthrift youth and perhaps not a very reliable witness but on this occasion he seems to me to be telling the truth." Having said that Toh Seng Huat was a very reliable witness the learned District Judge said that even apart from Toh Seng Huat's evidence he would have accepted the evidence of the defendant and he did not believe the plaintiff.

From the grounds of judgment it appears that he accepted the defendant's story and rejected the plaintiff's for three reasons.

1. The defendant (who never said until 2nd August that he had not received the $250/- on 3rd January) had not been anxious to come into Court at all, but had been persuaded to do so by his relatives. How this fact strengthens the defendant's case I am at a loss to see. It is equally open to the construction that he was unwilling to commit perjury and was persuaded to do so by his relatives who were trying to settle his debts.
2. That the plaintiff had admitted to Toh Seng Huat that he had only lent $100/- though Toh Seng Huat admitted that money lenders do not usually admit having lent less than the note shows. The evidence as to this alleged admission is most contradictory.
   In the middle of May Toh Seng Huat called a meeting of the defendant's creditors of whom there were twenty "for $3,000/- with interest rapidly piling up." The plaintiff was asked to accept a smaller sum than what he alleged was due (i.e. $250/- and interest on the note sued on in this case, and $300/- on another note) but he refused to agree. The plaintiff says the offer he rejected was $350/-.
   The defendant swore that the plaintiff wanted the two notes settled for $300/-. Then he swore "formerly Toh Seng Huat offered $300/- but plaintiff wanted $400/-. I offered plaintiff